Supreme Court, U.S.
FILED
JUL 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5916

In The

Supreme Court of the United States

October Term, 1990

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES A. MANSPEAKER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER

JAMES E. SCARBORO*
(Appointed by this Court)
ALFRED T. McDONNELL
DAVID C. WARREN
ARNOLD & PORTER
1700 Lincoln Street
Suite 4000
Denver, Colorado 80203
Telephone: (303) 863-1000
*Counsel of Record
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a convicted state prisoner, when summoned to appear as a witness in federal court, entitled to a witness fee pursuant to 28 U.S.C. § 1821(a)(1) and (b) for each day he is in attendance at court to provide testimony?

PARTIES

In addition to Petitioner Richard S. Demarest and Respondent James A. Manspeaker, Clerk of the United States District Court for the District of Colorado, the proceeding below included one Cathy, last name unknown, named as a defendant in Petitioner's original pleading in the district court, in her capacity as deputy clerk of the district court assigned to the criminal case from which this dispute arose.

The United States Court of Appeals for the Tenth Circuit consolidated several appeals filed by inmate witnesses from the underlying criminal action. Additional parties to the consolidated appeals were: Edgar Lee Durre, No. 88-1972; Ronald Reese, Nos. 88-1973 and 88-2782; and Elizabeth Durre, No. 88-2327. The United States was a party to each of the consolidated appeals.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. INTRODUCTION 11

II. THE COURT BELOW ERRED IN LOOKING BEYOND THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE 13

A. The Language of Section 1821(a)(1) and (b) Is Clear and Unambiguous 13

B. Related Provisions of Section 1821 Confirm the Plain Meaning of "A Witness" .. 14

1. Subsection (d)(1) 15

2. Subsection (d)(4) 17

3. Subsection (e) 20

III. THE LEGISLATIVE HISTORY OF SECTION 1821 IS INCONCLUSIVE AND CANNOT SUPPORT THE GOVERNMENT'S CONSTRUCTION OF THE STATUTE 22

A. The Legislative History Need Not Be Consulted Where the Language of the Statute Is Plain 23

B. The Legislative History Is Silent on the Entitlement of Inmates to Witness Fees .. 24

TABLE OF CONTENTS – Continued

Page

C. Payment of Fees to Prisoners Is Consistent with the Broad Purposes of the Witness Fee Statute 25

IV. CONTRARY JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS CANNOT ALTER THE EXPRESS LANGUAGE OF SECTION 1821 30

A. Judicial Interpretations 30

B. Administrative Interpretation 32

1. The Department of Justice 33

2. The Comptroller General 36

C. Congress Cannot Be Presumed to Have Adopted Interpretations Contrary to the Language of the Statute 37

V. THE SPECULATIVE POLICY CONCERNS OF THE COURT BELOW CANNOT JUSTIFY ITS AMENDMENT OF THE STATUTE 41

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Adams Fruit Co. v. Barrett, 110 S. Ct. 1384 (1990) 34, 35, 36, 40

Biddle v. Commissioner, 302 U.S. 573 (1938) 38

Blanchard v. Bergeron, 109 S. Ct. 939 (1989) 39

Burlington N. R.R. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 21, 23, 24, 29, 33

Caminetti v. United States, 242 U.S. 470 (1917) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 34, 36

Citicorp Industrial Credit, Inc. v. Brock, 483 U.S. 27 (1987) 16, 21, 25, 43

Commissioner v. Asphalt Products Co., 482 U.S. 117 (1987) 14, 21

Crandon v. United States, 110 S. Ct. 997 (1990) .. 16, 32, 36

FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 39

Green v. Bock Laundry Machine Co., 109 S. Ct. 1981 (1989) 24, 43

Greenwood v. United States, 350 U.S. 366 (1956) 23

Grove City College v. Bell, 465 U.S. 555 (1984) 39

Hallstrom v. Tillamook County, 110 S. Ct. 304 (1989) 14, 21, 22, 23, 29, 32

Helvering v. Hallock, 309 U.S. 106 (1940) 38

Hurtado v. United States, 410 U.S. 578 (1973) 17, 18, 23, 42

In re Grand Jury Matter, 697 F.2d 103 (3d Cir. 1982) 31

TABLE OF AUTHORITIES – Continued

Page

In re Witness Fees for Prisoner, 533 F. Supp. 401 (E.D. Pa. 1982) 31

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 11, 33, 36

Leary v. United States, 395 U.S. 6 (1969) 38

Mallard v. United States Dist. Court, 109 S. Ct. 1814 (1989) 11, 19, 36

Marchese v. United States, 197 Ct. Cl. 102, 453 F.2d 1268 (1972) 31, 32, 38, 40

Marks v. Calendine, 80 F.R.D. 24 (N.D.W. Va. 1978), *aff'd*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) 43

Mead Corporation v. Tilley, 109 S. Ct. 2156 (1989) 24

Meadows v. United States Marshal, 434 F.2d 1007 (5th Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971) 30, 31, 32, 38, 40

Mississippi Band of Choctaw Indians v. Holyfield, 109 S. Ct. 1597 (1989) 29

Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558 (1989) 29, 34

Public Employees Retirement System v. Betts, 109 S. Ct. 2854 (1989) 24, 33

Rodriguez v. United States, 480 U.S. 522 (1987) 23, 24

Rubin v. United States, 449 U.S. 424 (1981) 21, 24

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 38

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 24

United States v. Dangdee, 616 F.2d 1118 (9th Cir. 1980) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Garmany, 762 F.2d 929 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986) 31, 42

United States v. Ron Pair Enterprises, 109 S. Ct. 1026 (1989) 14

STATUTES & REGULATIONS

28 U.S.C. § 1821(a)(1), (b), (d)(1), (d)(4), (e) (1988) ..*passim*

28 U.S.C. § 1825(a), (b) (1988) 2, 34, 35, 36, 44

28 U.S.C. §§ 509, 510 (1988) 34

5 U.S.C. § 301 (1988) 34

Act of May 8, 1792, c. 36, § 3, 1 Stat. 277 24

Act of June 1, 1796, c. 48, § 2, 1 Stat. 492 25

Act of February 28, 1799, c. 19, § 6 25

Act of February 26, 1853, c. 80, § 3, 10 Stat. 167 25

Act of April 26, 1926, c. 183, §§ 1, 3, 44 Stat. 323 ..... 4, 37, 40

Act of June 30, 1932, c. 314, § 323(b), 47 Stat. 413 ..4, 37

Act of March 22, 1935, c. 39, § 3, 49 Stat. 105 ..... 4, 37

Act of December 21, 1942, c. 825, § 1, 56 Stat. 1088 37

Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950 ..... 5, 37, 41

Act of May 10, 1949, c. 96, 63 Stat. 65 37

Act of May 24, 1949, c. 139, § 94, 63 Stat. 103 37

Act of August 1, 1956, c. 826, 70 Stat. 798 37

TABLE OF AUTHORITIES – Continued

Page

Act of March 27, 1968, Pub. L. No. 90-274, § 102(b), 82 Stat. 62 37

Act of October 13, 1978, Pub. L. No. 95-535, 92 Stat. 2033 .....19, 37

28 C.F.R. § 21.4(d) (1989) 5, 33

28 C.F.R. § 545.20, 545.27, 545.29, 545.30, and 545.60-.63 37

28 C.F.R. pt. 21 (1989) 33

28 C.F.R. pt. 345, subpt. B (1989)..... 37

28 C.F.R. pt. 545, subpt. B (1989)..... 37

OTHER AUTHORITIES

51 Fed. Reg. 16171 (1986)..... 34

Black's Law Dictionary 685 (5th ed. 1979)..... 16

H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631 ..... 18, 22, 25, 27

Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. (1978)..... 19, 27, 28, 35

J. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture Into Speculative Unrealities, 64 B.U.L. Rev. 737, 755 (1985) 39

18 Comp. Gen. 609 (1939).....32, 33, 40

18 Comp. Gen. 765 (1939).....32, 40

6 Comp. Dec. 588 (1900).....28, 32, 37

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Crim. P. 17(b)..... 43

Fed. R. Ev. 609(a)(1) 43

OPINIONS BELOW

The opinion of the court of appeals is reported at 884 F.2d 1343 (10th Cir. 1989), and reprinted in the Joint Appendix at p. 11. The unreported order of the United States District Court for the District of Colorado is reprinted in the Joint Appendix at p. 9.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A timely petition for rehearing was denied on October 23, 1989. Petitioner filed his petition for a writ of certiorari on October 28, 1989. The petition was granted on April 23, 1990. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

A. 28 U.S.C. § 1821(a)(1), (b), (d)(1), (d)(4), (e) (1988)

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the

beginning and end of such attendance or at any time during such attendance.

* * *

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

* * *

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

B. 28 U.S.C. § 1825(a), (b) (1988)

(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the

court, shall be paid by the United States marshal for the district –

(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district –

(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

C. Act of April 26, 1926, c. 183, §§ 1, 3, 44 Stat. 323, *as amended by* Act of June 30, 1932, c. 314, § 323(b), 47 Stat. 413; Act of March 22, 1935, c. 39, § 3, 49 Stat. 105

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurors and witnesses (other than witnesses who are salaried employees of the Government, and detained witnesses) in the United States courts, including the District Court of Hawaii, the District Court of Porto [sic] Rico, and the Supreme Court of the District of Columbia, who attend, including those attending before United States commissioners, shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court, or upon the commissioner, and return home, and, in addition, mileage as hereinafter provided.
>
> Sec. 3. Witnesses attending in such courts, or before such commissioners, shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same, $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning, Provided, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, including the District Court of Hawaii, the District Court of Puerto Rico, and the District Court of the United States for the District of Columbia, who attend court or attend before United States commissioners, at points so far removed from their respective residences as to prohibit return thereto from day to day, shall be entitled, in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home. In cases in which the United States is a party, witnesses on behalf of the United States shall be entitled to the payments provided by this section upon the certificate of the United States attorney, or assistant United States attorney, or United States commissioner.

D. Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950

> A witness attending in any court of the United States or before a United States commissioner or person taking his deposition pursuant to any order of a court of the United States, shall receive $2 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 5 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $3 per day for expenses of subsistence.

E. 28 C.F.R. § 21.4(d) (1989)

> (d)(4) A witness (other than an alien covered by § 21.3) detained in custody pursuant to 18 U.S.C. 3149 for want of security for his or her appearance shall receive subsistence in kind and shall be paid a single daily attendance fee for each day the witness is detained. A witness in custody for purposes other than 18 U.S.C. 3149 is ineligible to receive the attendance and subsistence fees provided by this section.

STATEMENT OF THE CASE

In March of 1988, Petitioner Richard Demarest was an inmate in the Arkansas Valley Correctional Facility at Crowley, Colorado, where he was serving a sentence imposed by state law. On March 3, 1988, Mr. Demarest was transported by a United States Marshal to the Denver, Colorado County Jail pursuant to a writ of habeas corpus ad testificandum issued by Judge Jim R. Carrigan, United States District Court for the District of Colorado. Mr. Demarest was summoned to appear as a witness in the district court on the application of the defendant in federal criminal proceedings styled *United States v. Ronald Brooks Tippett*, No. 87-CR-386. Joint Appendix, p. 2.

Mr. Demarest was held in custody at the Denver County Jail from March 3 until April 5, 1988. Trial of the *Tippett* case commenced on March 7 and was concluded on March 18, 1988. Mr. Demarest testified in open court on March 15, 1988. After his testimony, Mr. Demarest requested that the deputy clerk of the district court certify his entitlement to witness fees pursuant to 28 U.S.C. section 1825(a). Mr. Demarest requested fees for 10 days: two days on which he was in transit between the Arkansas Valley Correctional Facility and the Denver County Jail, and eight days during which he was held in Denver County Jail while proceedings took place in the *Tippett* case. Joint Appendix, p. 3. The deputy clerk failed to issue the requested certification. Joint Appendix, p. 2.

On April 16, 1988 Mr. Demarest wrote to the clerk of the district court, James Manspeaker, again requesting certification for witness fees, and citing 28 U.S.C. section

1821. Mr. Manspeaker apparently referred the request to the Assistant U.S. Attorney who represented the United States in the *Tippett* case, a Mr. Curless. Mr. Curless responded by letter to Mr. Demarest denying his request for certification on the ground that prisoners are not entitled to receive witness fees. A further letter from Mr. Demarest to Clerk Manspeaker, dated May 2, 1988, also failed to produce the requested certification. Joint Appendix, pp. 2-3.

On May 25, 1988 Mr. Demarest filed and served in the district court a Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in the Nature of Mandamus (hereinafter the "Petition and Complaint"). The clerk and deputy clerk of the district court were named as defendants and served. In the Petition and Complaint, Mr. Demarest recited the foregoing facts and asked the district court to order the clerk to certify his request for fees. Joint Appendix, pp. 1-8. So far as the record reveals, the defendants filed no response to the Petition and Complaint and no hearing was held by the district court.

On June 1, 1988 the district court entered its order denying the Petition and dismissing the Complaint on the sole ground that 28 U.S.C. section 1821 does not authorize the payment of witness fees to convicted prisoners. Joint Appendix, pp. 9-10. Mr. Demarest filed a timely notice of appeal from the district court's order, and filed and served his brief thereafter. The record indicates no responsive papers filed by the appellees.

The United States Court of Appeals for the Tenth Circuit ordered the case submitted without oral argument

and the panel issued its opinion on September 5, 1989. By a two-to-one majority, the district court's order was affirmed. Judge Ebel filed a written dissent. Joint Appendix, pp. 11-22. After his petition for rehearing was denied, Joint Appendix, p. 24, Mr. Demarest filed his petition for certiorari with this Court, which was granted on April 23, 1990.

SUMMARY OF THE ARGUMENT

This case presents a straightforward issue of law which nevertheless raises important questions concerning statutory construction and relations between the judicial and legislative branches of government. A federal statute unequivocally states that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1). With equal clarity, the following subsection provides: "A witness shall be paid an attendance fee of $30 per day for each day's attendance." *Id.* § 1821(b). Petitioner Demarest, it is undisputed, was summoned to appear in the United States District Court for the District of Colorado and gave testimony as a witness. Yet he was denied the attendance fee to which he is plainly entitled under the statute.

The majority below justified this result by reading into the statute an exception nowhere expressed or implied in the language chosen by Congress. It ignored the clear and unambiguous language of the statute and held that Congress intended to except from the phrase "a

witness" any person incarcerated for the commission of a crime.

Three related provisions of the statute confirm that the words "a witness" in subsections (a) and (b) must be given their ordinary meaning. Subsection (d)(1), which excludes "incarcerated witnesses" from entitlement to an additional subsistence allowance, shows unmistakably that the phrase "a witness" in subsections (a)(1) and (b) *includes* incarcerated witnesses such as Mr. Demarest. Subsection (d)(4), which entitles "detained" witnesses – those confined for want of security for their appearance – to an additional benefit, shows that Congress distinguished between "detained" and "incarcerated" witnesses in the language and scheme of the statute, and made separate provisions for each. Subsection (e), which excludes certain alien witnesses, demonstrates that Congress considered who should be excluded from witness fees and allowances and knew how to accomplish that purpose expressly.

Read in context, these related provisions demonstrate a rational and deliberate approach by Congress discriminating between incarcerated, detained, and other witnesses in a manner appropriate to their different circumstances. The court below ignored the careful construction of the statutory scheme except to suggest that it was "plausible" that Congress meant the same thing by the terms "incarcerated" in (d)(1) and "detained pursuant to section 3149 of title 18" in (d)(4) – an interpretation inconsistent with the language and design of the statute.

The legislative history provides no basis for ignoring the statute's plain language. It does not speak to the issue

presented here. In its general statements of purpose or intent, the legislative history, fairly read, confirms that payment of witness fees to inmates is consistent with the underlying purpose of the witness fee provision. Certainly nothing in the legislative history so clearly suggests the contrary as to justify the lower court's refusal to apply the statute as written.

Less recent federal judicial opinions interpreting the statute are devoid of analysis. They merely defer, as did the majority here, to administrative practices by the Comptroller and the Department of Justice. But neither of these agencies has been charged by Congress with any special responsibility for interpreting the witness statute and neither has any special expertise that would make deference to its opinions appropriate. There is no evidence that Congress ever adopted or ratified any such interpretation. More fundamentally, judicial and administrative interpretations contrary to the clear and unambiguous language of the statute should not be permitted to stand.

Apparently, the majority below was convinced that paying witness fees to prisoners is a poor federal policy. Prisoners have meager incomes anyway, and attendance fees might encourage indigent criminal defendants to subpoena their incarcerated friends. There is nothing in the record to confirm such fears, but, even were there, it is for Congress, not the courts, to weigh countervailing policy considerations. Petitioner suggests that the proper course is to enforce the law as written, leaving to Congress the task of rewriting the statute if it chooses to do so.

ARGUMENT

I. INTRODUCTION

Interpretation of a statute must begin with its language, not merely the particular words in dispute but the language of the statute as a whole. *Mallard v. United States Dist. Court*, 109 S. Ct. 1814, 1818 (1989); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The relevant language from 28 U.S.C. section 1821 reads as follows:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> * * *
>
> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> * * *
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day

of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

The scheme of these related provisions is straightforward. Subsection (a)(1) defines the general class entitled to benefits under section 1821. Subsection (b) provides for a mandatory witness fee of $30 per day for each day's "attendance." Subsection (d)(1) provides for a subsistence allowance, in addition to the witness fee, under certain circumstances, but expressly excludes from this benefit witnesses who are "incarcerated." Subsection (d)(4) is a special provision bestowing additional benefits on a carefully defined subset of incarcerated witnesses: those "detained pursuant to section 3149 of title 18." Such witnesses are entitled, in addition to the $30 per day witness fee for each day's attendance provided by subsection (b), to a similar payment for each additional day of detention when not "in attendance" at court. Subsection (e) expressly and specifically excludes certain classes of alien witnesses from any of the benefits conferred by section 1821.

A study of these provisions, Petitioner suggests, leads plainly to the conclusion that he was a witness

entitled to an attendance fee. The majority below, however, chose to ignore the clarity of the statutory scheme. Purporting to find a "plausible" alternative reading of the statute based upon subsection (d)(4), the court shifted its focus from the statute itself to its legislative history and administrative and judicial readings of it. Ultimately, the majority's judgment seems to rest upon deference to administrative practice and its own policy concerns.

Petitioner submits that the majority erred. The language of the statute is plain. Its provisions, read as a whole, make sense. There was no warrant to go beyond them. In any event, the legislative history is unilluminating; judicial precedents are scarce and rely uncritically upon administrative practice. Though admittedly long-standing, that administrative practice is not based upon a persuasive reading of Congress' language but instead upon a conviction that prisoners do not need and should not receive witness attendance fees. Whatever the wisdom of Congress' judgment, administrative practice should not be permitted to nullify it.

II. THE COURT BELOW ERRED IN LOOKING BEYOND THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

A. The Language of Section 1821(a)(1) and (b) Is Clear and Unambiguous

Section 1821(a)(1) entitles "a witness in attendance" at federal court to the benefits generally authorized by the section. The mandatory nature of the entitlement is underscored by the use of the phrase "shall be paid" which follows. No one disputes that Petitioner was a

witness in attendance at the underlying federal court proceeding from which this dispute arose.

The same unqualified, all-inclusive language is used in section 1821(b), which mandates payment of the daily attendance fee which is the basis of Petitioner's claim: "A witness shall be paid an attendance fee of $30 per day for each day's attendance." The court below acknowledged "the unqualified wording of subsections (a)(1) and (b)," Joint Appendix, p. 14, but failed to accept the consequences of that fact. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

In short, the operative language of the statute "could not be clearer. . . . It is impossible further to explain the statute without merely repeating its language. . . . The language is clear and leads to no other interpretation." *Commissioner v. Asphalt Products Co.*, 482 U.S. 117, 120 (1987). *See also Hallstrom v. Tillamook County*, 110 S. Ct. 304, 309 (1989). "The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. . . . In this case it is also where the inquiry should end." *Ron Pair Enterprises*, 109 S. Ct. at 1030.

B. Related Provisions of Section 1821 Confirm the Plain Meaning of "A Witness"

Reference to subsections (d)(1), (d)(4), and (e) of section 1821 conclusively confirms that the phrase "a witness" means any witness, including those who are

incarcerated. Each of these subsections clearly and independently implies that imprisoned witnesses are included in the general class defined by subsection (a)(1).

1. Subsection (d)(1)

Subsection (d)(1) is a parallel provision to subsection (b). Each provides a separate, specific benefit to the class of persons identified in (a)(1). Subsection (d)(1) provides:

> A subsistence allowance shall be paid to *a witness (other than a witness who is incarcerated)* when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day. [Emphasis added.]

Congress' use of the emphasized words removes any doubt that an incarcerated witness is "a witness" within the meaning of subsection (a)(1). If it were not so, there would have been no need to except such witnesses from the subsistence allowance provision, because incarcerated witnesses would not then be entitled to *any* benefits under section 1821. Moreover, the use of unqualified language in 1821(b), followed closely by qualified language in the parallel provisions of 1821(d)(1), strongly suggests that Congress intended the former to have broad application. *United States v. Dangdee*, 616 F.2d 1118, 1119-20 (9th Cir. 1980).

There is no reason to believe that the distinction drawn here by Congress – providing witness fees to incarcerated witnesses, but denying an attendance allowance – is not deliberate and rational. Incarcerated

witnesses, unlike others, do not have expenses for lodging and meals. On the other hand, Congress could logically reward incarcerated witnesses just as it does others for performing the public duty and service of providing testimony. *See* Section III.C. *infra*. The distinction evidenced in these two subsections clearly implies that Congress was aware of the different circumstances of incarcerated and other witnesses and expressly provided for differential treatment in cases considered appropriate. "Congress limited *other* provisions of the [statute] . . . , which indicates that its failure to do so in [a particular subsection] was not inadvertent." *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 34 (1987) (emphasis in original). *See Crandon v. United States*, 110 S. Ct. 997, 1004 (1990) (use of language specifically reaching "preemployment" situations in two similar provisions indicates Congress did not intend to reach such situations in a third provision containing no such language).

It should also be apparent that Congress selected its language with some care. The word "incarcerated" means "imprison[ed]; confine[d] in a jail or penitentiary." Black's Law Dictionary 685 (5th ed. 1979). It refers to persons confined by the state for any reason: awaiting trial, detained as a witness, or serving a sentence. By clear implication, incarcerated witnesses – including convicted prisoners – are included in the category defined by subsection (a)(1) and entitled to the witness fee provided by subsection (b). Any other reading does violence to the statutory language and scheme devised by Congress. As Judge Ebel observed in his dissenting opinion, "If there

were any doubt as to whether 'a witness' includes incarcerated witnesses, subsection d(1) settles the matter." Joint Appendix, p. 17.

2. Subsection (d)(4)

Subsection (d)(4) authorizes a special benefit for a particular subset of incarcerated witnesses: those detained for want of security for their appearance pursuant to a particular federal statute. Although excluded from the subsistence allowance provided by (d)(1) because of their incarcerated status, such prisoners are entitled to the general witness fee in subsection (b).

Presumably it is undisputed that at least this category of incarcerated witnesses is included in the benefits available under subsections (a)(1) and (b). *See Hurtado v. United States*, 410 U.S. 578 (1973).[1] Subsection (d)(4)

---

[1] *Hurtado* is this Court's only interpretation of the witness fee statute. A group of aliens, detained in this country to provide testimony on behalf of the government against those who assisted their illegal entry into this country, sought to obtain the basic $20 witness fee, provided by section 1821(b)'s precursor, for each day's confinement. The administrative practice at the time was to pay such witnesses that fee only for those days when the witness actually testified in court, and to pay $1 per day for the balance of the witness' confinement under a former provision somewhat akin to subsection (d)(4). The Court determined that such witnesses were entitled to the basic witness fee of $20 per day for each day "in attendance" – confined to secure testimony while the trial was in session – and $1 per day for the remainder of confinement. Although it did not address directly the issue raised here, the *Hurtado* opinion is important to this case for three reasons. First, it

(Continued on following page)

serves only to ensure that detained witnesses, in addition to such payments, are similarly compensated for days of detention on which, for one reason or another, they are not actually "in attendance" at the trial to which they are summoned. Again, this distinction between the subclass of "detained" witnesses and the larger class of "incarcerated" witnesses is reasonably related to the different circumstances of the two groups. "Detained" witnesses, confined solely to secure their testimony, are entitled to be paid for each day of incarceration. Prisoners, on the other hand, are entitled to fees only when "in attendance" at court since they are incarcerated already for independent reasons.

The current language of subsection (d)(4), as amended in 1978, was enacted in response to the *Hurtado* dissent's contention that the previous version of the statute worked a hardship on detained, incarcerated witnesses by providing them only $1 per day when detained but not "in attendance" at trial. *See Hurtado*, 410 U.S. at 591-600 (Brennan, J., concurring in part and dissenting in part). *See also* H.R. Rep. No. 95-1651, 95th Cong., 2d Session 5 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad.

(Continued from previous page)

defined the meaning of "in attendance" and prescribed the period for which witnesses "in custody" were entitled to the basic witness fee. Second, it confirmed the plain meaning of "a witness": "The statute provides $20 per diem compensation to a witness who is in necessary attendance on a court, but *that fee is payable to any witness, incarcerated or not.*" 410 U.S. at 590 (emphasis added). Third, it demonstrated that agency interpretations of the witness fee statute are not entitled to deference where they conflict with the meaning of the statute.

News 4631, 4634; Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 91 (1978).

The suggestion of the majority below that the purpose of subsection (d)(1) is simply to make explicit what subsection (d)(4) "implies" – that detained witnesses are not entitled to a subsistence allowance in addition to attendance fees – defies the statutory language, common sense, and the legislative history of section 1821. The clear purpose of subsection (d)(4) is to provide, out of fairness, benefits different from those granted in subsections (b) and (d)(1). Subsection (d)(1) uses a different and more inclusive term, "incarcerated," to describe those witnesses excluded from entitlement to a subsistence allowance – a term consistent with the rationale for exclusion. Subsection (d)(4), on the other hand, uses precise terms to describe the special sub-category of incarcerated witnesses who are eligible for an additional benefit because of their peculiar circumstances. Where Congress chooses different terms in two closely related subsections of a statute, courts must assume that choice to be deliberate and give effect to each according to its terms. *See Mallard*, 109 S. Ct. at 1818 (use of precatory language in one subsection followed by mandatory language in the next is "perhaps the clearest proof" that former was not intended to be compulsory).

Moreover, had Congress intended merely to "clarify" subsection (d)(4), it could certainly have done so more efficiently and clearly by amending subsection (d)(4) itself. Congress did in fact amend subsection (d)(4) in 1978.[2] If

---

[2] Act of October 13, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

its intention was to "clarify" (d)(4), it had merely to add a sentence at the end such as: "Such witnesses, however, shall not be entitled to the subsistence allowance provided by subsection (d)(1) of this section while detained." Even more simply, of course, Congress could have referred specifically to subsection (d)(4) in the parenthetical phrase in (d)(1), thus: "(except detained witnesses as defined in subsection (d)(4) of this section)." The fact that (d)(1) and (d)(4) appear as separate subsections, and use different operative terms, strongly implies that they have different purposes and were intended to affect different categories of witnesses, and contradicts the view that the first merely clarifies the second.

3. Subsection (e)

Perhaps the most compelling evidence from the statutory scheme that subsections (a)(1) and (b) mean precisely what they say is found in subsection (e), which was added to the statute by amendment in 1978. Subsection (e) specifically and unequivocally excludes certain classes of alien witnesses from *any* of the benefits of section 1821. Subsection (e) conclusively demonstrates that Congress focused in 1978 on the question of excepting certain classes of witnesses, and identified those it chose to exclude from the phrase "a witness" in subsection (a)(1). It goes without saying that Congress could have added other classes of witnesses to subsection (e) if it intended others to be excluded. As Judge Ebel observed in dissent, "subsection (e) provides the one and only category of persons who are not entitled to receive witness attendance fees. . . . Congress plainly knew how to exclude

expressly a class of persons from the broad category of 'witnesses' . . . and Congress did so." Joint Appendix, p. 18. *See Citicorp*, 483 U.S. at 34 (fact that Congress identified only two narrow categories of "innocent" persons exempted from the statute "suggests that all other persons, innocent or not, *are* subject to the statute").

The majority opinion below did not even address the implication of subsection (e) when it engrafted its own further exception onto section 1821. In fact, the opinion below ignored the statutory scheme completely except to suggest that there is "another plausible reading" of the relationship between subsections (d)(1) and (d)(4) to that expressed by the ordinary meaning of the words. Joint Appendix, p. 14. In evading the plain language of the statute and the clear implications of the statutory scheme, the court below violated this Court's most fundamental principles of statutory construction, and its decision must therefore be reversed. "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).[3] A court "cannot justify disregard of what Congress has plainly and intentionally provided." *Asphalt Products Co.*, 482 U.S. at 121. The court below was "not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 110 S. Ct. at 309.

---

[3] As the balance of this brief demonstrates, there are no "exceptional circumstances" in this case which could justify the result below.

III. THE LEGISLATIVE HISTORY OF SECTION 1821 IS INCONCLUSIVE AND CANNOT SUPPORT THE GOVERNMENT'S CONSTRUCTION OF THE STATUTE

Based on a single excerpt from the legislative history of section 1821, the majority below suggested that "compelling reasons support the view that incarcerated prisoner witnesses *should* not receive fees for their appearances." Joint Appendix, p. 16 (emphasis added). The only language cited for this proposition is the following quotation from a House committee report: "[Witness fees and allowances] 'no longer compensate the average witness for the actual costs which witness service entails.' " Joint Appendix, p. 16 (quoting H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4631). Because prisoner witnesses do not normally incur such costs "beyond their loss of the very modest compensation they might receive from participating in prison job programs," the court reasoned, they are not "average witnesses" and are not entitled to fees. *Id.*[4]

The majority's reliance on this vague and isolated statement of legislative purpose is misplaced for several reasons. *First*, it was improper for the court below to resort to legislative history to vary the unambiguous language of the statute. *Hallstrom v. Tillamook County*, 110

---

[4] There is, of course, no evidence in the record to suggest how much income, if any, Petitioner Demarest was required to forego due to his summons to testify, or whether any such income derived from compensation from prison work, from handicrafts, or from other sources.

S. Ct. 304, 310 (1989). *Second*, even if the legislative history were a proper indicator of congressional intent in this case, a full review of that history reveals that it is "inconclusive and irrelevant" on the issue of convicted prisoners' entitlement to witness fees. *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). As best Petitioner Demarest can determine, not once in the 200-year history of witness fee legislation has Congress or its committees or members expressed a view on the subject beyond the language of the statute itself. *Third*, the legislative history contains other general statements of purpose which are perfectly consistent with payment of fees to inmate witnesses, and the court below misread the "average witness" language in the excerpt it chose. *See Hallstrom*, 110 S. Ct. at 310.

In short, the legislative history of the witness fee statute is, as this Court noted on a previous occasion, "unenlightening." *Hurtado*, 410 U.S. at 586 n.7. In such circumstances, Petitioner suggests, the only reliable indicator of Congress' intent is the language it has chosen to include in the statute. *Burlington N. R.R.*, 481 U.S. at 461; *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

A. The Legislative History Need Not be Consulted Where the Language of the Statute is Plain

When the Court determines that the language of a statute is clear and unambiguous, its legislative history

typically is not consulted to vary the ordinary meaning of that language. *E.g., Mead Corporation v. Tilley,* 109 S. Ct. 2156 (1989); *Public Employees Retirement System v. Betts,* 109 S. Ct. 2854 (1989); *Rodriguez v. United States,* 480 U.S. 522 (1987); *Burlington N. R.R. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987); *Rubin v. United States,* 449 U.S. 424 (1981); *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). Exceptions are limited to those rare cases where "exceptional circumstances dictate otherwise." *Burlington N. R.R.,* 481 U.S. at 461. Such "exceptional circumstances" may include "a clearly expressed legislative intention to the contrary," *id.,* or where a literal application of the statutory language produces an absurd result. *Green v. Bock Laundry Machine Co.,* 109 S. Ct. 1981, 1985 (1989). Here, as the following discussion indicates, there is *no* clearly expressed congressional intention in the legislative history with respect to inmate witnesses. Moreover, there is nothing absurd about paying such witnesses the modest fee provided by section 1821(b). Indeed, such payments would further the congressional purposes identified in the legislative history.

B. The Legislative History Is Silent on the Entitlement of Inmates to Witness Fees

The first federal statute providing for witness fees was enacted in 1792.[5] The statute has been amended 11

[5] Act of May 8, 1792, c. 36, § 3, 1 Stat. 277: "To witnesses summoned in any of the courts of the United States the same compensation in each state respectively as are allowed in the supreme courts of the same."

times since.[6] In none of the available hearings, debates, or committee reports of which Petitioner is aware is there any specific statement of the intentions of Congress with respect to convicted inmates who are summoned as witnesses. The legislative record is simply silent on this point. *See Citicorp Industrial Credit Inc. v. Brock,* 483 U.S. 27, 34-35 (1987) (refusing to add secured creditors to categories exempted from provision of FLSA prohibiting shipment of "hot goods" where Congress specified two express exemptions and there was no indication in the legislative history that Congress considered the status of secured creditors).

C. Payment of Fees to Prisoners Is Consistent With the Broad Purposes of the Witness Fee Statute

The court below referred to language in a committee report accompanying the 1978 amendment. The full sentence is: "Witness fees and allowances now provided pursuant to section 1821, because of inflation, no longer compensate the average witness for the actual costs which witness service entails." H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4631. Some qualification and amplification of this statement are necessary in order to understand it.

First, the 1978 amendments revised *all* the fees and allowances associated with witness service, not just the

[6] See note 14, *infra*. The statute was also amended in 1796, Act of June 1, 1796, c. 48, § 2, 1 Stat. 492; in 1799, Act of February 28, 1799, c. 19, § 6; and in 1853, Act of February 26, 1853, c. 80, § 3, 10 Stat. 167.

per diem attendance fee. These included the subsistence allowance and travel allowance, both of which relate more directly to the "actual costs" rationale.

Second, the court below misinterpreted or misapplied the legislative reference to the "average witness" by taking it out of context.

Third, the quoted statement refers to the purpose of the *amendment*, which was principally to increase fees and allowances, not the purposes of the underlying entitlement to witness fees. With respect to this more fundamental question, and with specific reference to the attendance fee, the committee report includes these observations:

> "The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduated scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was considered feasible, and therefore *the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness.*" [Citation omitted.] This statement is of equal validity today.
>
> * * *
>
> Since 1968 the average daily income has increased by over 60 percent, while the witness fee has remained the same. Proposed legislation therefore increases the witness fee to $30 per day. This is the minimal level of compensation that constitutes a respectable remuneration for witness service today. As stated above, it is *not intended as reimbursement for lost income*, witness service being a public obligation for which the Government is not required to provide compensation. However, *as a matter of public policy* the Government ought not to take the time of citizens, any more than their property without reasonable compensation. Moreover, fair compensation should be provided *in order to promote respect for citizen participation in our system of justice*. Payment of $30 per day, which translates into an annual wage of $7,500, is the minimally acceptable level for the daily attendance fee.

Id. at 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4632 (emphasis added).

This language emphasizes that it is *not* the purpose of the attendance fee to compensate for lost income, as the court below assumed, but rather to dignify and encourage participation of witnesses in the justice system. The amount prescribed is a fairly arbitrary figure, designed for convenience of administration rather than individual reimbursement. Congress clearly recognized that some witnesses, like prisoners or the unemployed, might be "overcompensated" with respect to their usual income while others with greater earning capacity would be disadvantaged. The report's reference to the "average witness" must be understood in this context. It does not imply, as the court below assumed, that only "average witnesses" are to receive the attendance fee, but rather that a single fee is to be paid to *all* witnesses, regardless of circumstances, in order to achieve an overall result that is "reasonably fair to the average witness." *See also* Hearing Before the Subcomm. on Courts, Civil Liberties, and

the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 67 (May 4, 1978) (statement of Raymond Calamaro) ("While witness service is a civic obligation, it is important that the witness fee be sufficient to demonstrate that this is an essential public service and to encourage witnesses to render their services freely and fully.").

Payment of witness fees to prisoners clearly furthers the goals of "encouraging witnesses to render their services freely and fully" and to "promote respect" for witness service. Indeed, because of, not despite, the relatively meager incomes of prisoner witnesses, such payments may be particularly important in promoting the cooperation of witnesses who possess important testimony. Prisoners too may experience additional hardship and deprivation as a result of a summons to serve as a witness. Mr. Demarest, for example, spent several weeks in county jail as a result of his summons, where he was unable to earn his income from prison employment and where conditions were presumably less favorable than in the institution from which he had been removed. Moreover, inmates may be particularly reluctant to testify in some cases for reasons peculiar to their condition. To the extent that payment of fees to inmate witnesses would serve to overcome that reluctance, the interests of justice are better served.[7]

---

[7] In addition, the rationale of the court below is inconsistent with administrative practice. For example, witness fees apparently are paid to witnesses who are incarcerated pending their own trial. 6 Comp. Dec. 588 (1900). Yet such witnesses

(Continued on following page)

Such considerations do not mean, of course, that Congress consciously and expressly stated in the legislative history that convicted prisoners are entitled to the witness fees provided in section 1821, any more than the legislative excerpt relied on below proves the contrary. The exercise simply demonstrates that the application of broad purposes to specific questions of legislative intent is far less precise an inquiry than reading the terms of a statute. *See Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1607 (1989) ("We have often stated that in the absence of a statutory definition we 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used' " (citation omitted)). Justice Kennedy's observation about the difficulty of construing a statute based on the "spirit of the legislation," instead of its words, is particularly applicable to the majority opinion below: "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Public Citizen v. United States Dept. of Justice*, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., concurring). The language of section 1821 is clear, and its history is at best ambiguous. In such a case the language must control. *Hallstrom*, 110 S. Ct. at 310; *Burlington N. R.R.*, 481 U.S. at 461.

(Continued from previous page)

lose no income by virtue of witness service; they are already incarcerated on other grounds and, in most cases, probably have no ability to earn even the modest income available to prison inmates. Under the principle announced below, they are no more "average witnesses" than convicted inmates, and should not be entitled to a fee.

IV. CONTRARY JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS CANNOT ALTER THE EXPRESS LANGUAGE OF SECTION 1821

The court below relied on prior judicial and administrative interpretations of section 1821 and its predecessors. But judicial opinions on the subject are few and generally do not include any real analysis of the issue presented here. Administrative interpretations or practices deserve no deference in this case. First, any interpretation inconsistent with the clear and unambiguous language of the statute cannot stand; if the Court accepts the analysis contained in Section II of this argument, it must reject any contrary interpretation. Second, neither the Department of Justice nor the Treasury Department is charged with any special responsibility to interpret or enforce section 1821, and their views carry no special weight. Third, there is no indication whatever that Congress ever ratified or adopted any interpretation of the statute contrary to its evident meaning.

A. Judicial Interpretations

The first time a federal appellate court interpreted section 1821 was in *Meadows v. United States Marshal*, 434 F.2d 1007 (5th Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971). The Fifth Circuit did not actually analyze the statute or its language. Indeed, it made no analysis of any kind, but merely reprinted the district court's one-page order denying a writ of mandamus. That order's consideration of the substantive question is contained in a single paragraph denying mandamus because the duty to pay such witnesses was not "clear." 434 F.2d at 1008. The district

court, in effect, treated the prisoner witnesses' claim as if it were conjured from thin air: "No authority has been cited, and this court is aware of none, for the proposition that federal prisoners are entitled to compensation for serving as witnesses in federal court." *Id.* One wonders why the statute itself was not viewed as sufficient authority.

Meadows pointed the false trail that all subsequent courts have blindly followed. *Marchese v. United States*, 197 Ct. Cl. 102, 453 F.2d 1268 (1972), is almost equally brusque. The actual language of the statute is demoted to an initial footnote. Relying principally on *Meadows* and "suggestions" derived from its view of the legislative purpose, the court concluded that there was no reason to "upset" administrative practice. 453 F.2d at 1271.

United States v. Garmany, 762 F.2d 929 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986), cited by the majority below, did not even address the issue, which was not before the court. The only reference to prisoners' entitlement to witness fees occurs in a footnote of dicta in which the court speculates on how the government might have calculated the cost of providing inmate witnesses to a non-indigent defendant. 762 F.2d at 933 n.2.

In re Grand Jury Matter, 697 F.2d 103 (3d Cir. 1982), is a summary affirmance, without any analysis, of a district court order denying fees.[8]

---

[8] The district court, in turn, relied on *Meadows* and *Marchese*, along with the "purposes behind the fees, Congressional intent . . . and long-standing Treasury policy." *In re Witness Fees for Prisoner*, 533 F. Supp. 401, 403 (E.D. Pa. 1982).

"In sum, the Government's position is not supported by a long, or even appreciable, body of judicial interpretation." *Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring). The *Meadows* decision, which begot this line of cases, was an unreasoned exercise in *ipse dixit*. *See id.* at 1013. Its progeny have perpetuated the error of *Meadows* both in method and result. In each of the judicial opinions on section 1821's application to prisoners, including the opinion below, the courts have looked everywhere except to the statute itself to divine its meaning. Such studious avoidance of the statutory language fatally compromises the value of these opinions, and accordingly they deserve to be disregarded. Prior judicial interpretations of section 1821 "flatly contradict the language of the statute." *Hallstrom*, 110 S. Ct. at 309.

B. Administrative Interpretation

The court below also relied on an opinion of the Comptroller of the Treasury in 1900[9] and Department of

---

[9] 6 Comp. Dec. 588 (1900). The Comptroller's opinions on this subject are somewhat more complicated and less clear than this citation suggests. The opinion referred to by the court below actually concludes that a witness held in custody awaiting his own trial on criminal charges *is* entitled to a per diem payment. It refers, however, to an *earlier* Comptroller's opinion which apparently held that convicted prisoners are not. *Id.* at 588. Other courts have relied on two 1939 opinions of the Comptroller General, 18 Comp. Gen. 609 and 18 Comp. Gen. 765, which disapproved the payment of witness fees by U.S. Marshals to convicted prisoners. *E.g., Marchese, supra,* 453 F.2d at 1271. What *Marchese* fails to note, however, is that the

(Continued on following page)

Justice regulations promulgated in 1986. Joint Appendix, pp. 14-16. But "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and long-standing agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854, 2863 (1989). Moreover, even if they did not conflict with the plain language of the current version of section 1821, these administrative views on the subject are entitled to no particular deference.

1. The Department of Justice

The Department of Justice's views on the subject are contained in a short set of regulations interpreting sections 1821-1825. 28 C.F.R. pt. 21 (1989). A single sentence added at the end of subsection 21.4(d) purports to deprive prisoners of the benefits granted by Congress. The language of the regulation is clearly inconsistent with the actual language of the statute: "A witness in custody for purposes other than 18 U.S.C. 3149 is ineligible to receive the attendance and witness fees provided by this section." 28 C.F.R. § 21.4(d) (1989). This is not "construction" of the statute; it is amendment. *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 (1987); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (regulation

---

(Continued from previous page)

language of the 1939 version of the statute expressly excluded "detained witnesses" from the witness fee provision. *See* Section III.C., *infra*. The Comptroller General relied on that exclusion, at least in part, in reaching his opinion. 18 Comp. Gen. at 610. The present statute, of course, is to the contrary.

invalid where it cannot be reconciled "under . . . [any] reasonable construction of the statutory language").

There are additional reasons to discount the Department of Justice regulation. Section 21.4(d), first promulgated in 1986, was not contemporaneous with passage of the operative language in 1978. *Public Citizen v. United States Dept. of Justice*, 109 S. Ct. 2558, 2571 n.12 (1989). More fundamentally, no statutory delegation of authority permits the Justice Department "to issue . . . a regulatory definition . . . carrying the force of law." *Id. See Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990) (no delegation of authority to agency evident in statute; no deference due to agency interpretation). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (EPA regulations promulgated pursuant to Clean Air Act's delegation of authority to that agency to enforce and administer statutory scheme entitled to deference where not inconsistent with statute).

The Department of Justice cited 28 U.S.C. sections 509, 510, and 1821-25 as authority for the promulgation of the regulation. 51 Fed. Reg. 16171 (1986).[10] Section 509 simply vests Department of Justice functions in the Attorney General. Section 510 permits the Attorney General to delegate his authority to other agency officers. Sections 1821-25 are substantive provisions for fees and allowances and specify procedures for their payment. Nowhere in these provisions does it appear that Congress

[10] 5 U.S.C. § 301 is also cited. This statute generally authorizes "the head of an executive Department" to prescribe regulations for the "government of his department" and the "conduct of its employees."

expressly or impliedly delegated any legal discretion whatsoever to the Attorney General or the Department of Justice.[11] Only section 1825 mentions Department of Justice personnel, and the language of that section does not grant discretion; it imposes mandatory ministerial duties.[12] *See Adams Fruit*, 110 S. Ct. at 1391 (limited administrative responsibilities do not create authority to interpret substantive provisions of law).

This is not a case in which highly technical subject matter suggests the need for agency expertise in the interpretation of statutory standards, or where "the

[11] Section 1821 sets fees for all witnesses in federal court, including those subpoenaed by solvent parties. Where the fees are paid by such a party, the Department of Justice plays no role in the administration or payment of fees. *See* 28 U.S.C. § 1825 (1988). Its role is limited to cases where witnesses are called by the government or by indigent criminal defendants. *Id*. Witness fees are also administered in part by court personnel. *Id*.

[12] "The United States marshal *shall pay* all fees of witnesses." 28 U.S.C. § 1825(a) (1988) (emphasis added); "In proceedings in forma pauperis . . . , the United States marshal for the district *shall pay* . . . all fees of witnesses." 28 U.S.C. § 1825(b) (1988) (emphasis added).

If it reveals anything on this subject, the legislative history of the 1978 amendment suggests that the Department of Justice did not ask for, and Congress did not grant, discretionary power in the payment of witness fees. *See* Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 89 (1978) (testimony of Mr. Calamaro) ("MR. KASTENMEIER: . . . We are apparently not giving anyone discretion with respect to that [fees for witnesses].").

agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. The statute leaves no "gap" for the Department of Justice to fill. *Adams Fruit*, 110 S. Ct. at 1390. This is a garden-variety statute dealing with a matter of judicial administration, and concerns a subject intimately familiar to the courts, as did the statute authorizing federal judges to "request" attorneys to represent indigent defendants in *Mallard*. *See also Crandon*, 110 S. Ct. at 1011 (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). While the Justice Department has certain ministerial duties in processing payment of fees authorized by section 1821, 28 U.S.C. § 1825(a), (b), the Attorney General should be credited with no more insight into the substantive meaning of section 1821 than the Court itself possesses.[13]

2. The Comptroller General

The Comptroller General has no particular responsibility for interpreting or enforcing section 1821. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring). Nor is he vested with the "specific responsibility for administering the law that triggers" the judicial deference prescribed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* The

[13] Nor is this a case in which significant commercial expectations and investments have crystallized around a long-standing and generally accepted agency interpretation of a statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 312 (1988) (Brennan, J., concurring).

Comptroller General's responsibility is simply to insure that Treasury funds are lawfully disbursed under a myriad of statutes and regulations, whether they are intended for witness fees, weapons procurement, or other federal programs.

Finally, the Comptroller's opinions long predate the current statute. Not only have numerous amendments[14] changed the language of the statute, some in ways affecting its interpretation, but these views hark back to a day when the common view was that prison inmates "forfeited" all rights and that their "time and services belonged" entirely to the government. 6 Comp. Dec. 588, 588 (1900).[15]

C. Congress Cannot Be Presumed to Have Adopted Interpretations Contrary to the Language of the Statute

Seeking to strengthen these slim reeds of judicial and administrative interpretation, the court below asserted

[14] Act of April 26, 1926, c. 183, §§ 1-3, 44 Stat. 323; Act of June 30, 1932, c. 314, § 323(b), 47 Stat. 413; Act of March 22, 1935, c. 39, § 3, 49 Stat. 105; Act of December 21, 1942, c. 825, § 1, 56 Stat. 1088; Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950; Act of May 10, 1949, c. 96, 63 Stat. 65; Act of May 24, 1949, c. 139, § 94, 63 Stat. 103; Act of August 1, 1956, c. 826, 70 Stat. 798; Act of March 27, 1968, Pub. L. No. 90-274, § 102(b), 82 Stat. 62; Act of October 13, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

[15] Current Bureau of Prisons regulations make clear that financial incentives are appropriate and necessary rehabilitation techniques. *See, e.g.*, 28 C.F.R. § 545.20 (purpose of "performance pay"), 545.27 (pay grades), 545.29 (achievement awards), 545.30 (special awards), and 545.60 -.63 (incentive awards). *See generally* 28 C.F.R. pt. 345, subpt. B (UNICOR program); 28 C.F.R. pt. 545, subpt. B (Inmate Financial Responsibility Program).

that Congress implicitly adopted them by failing to amend the statute in response to them. "Had Congress meant to change the existing judicial and administrative interpretation of § 1821, it surely could have done so in more express terms." Joint Appendix, p. 15. The lower court's "venture into speculative unrealities"[16] in this case illustrates the dangers inherent in imputing a meaning to congressional silence. There is no indication whatsoever in the legislative history that Congress was aware in 1978 of either the Comptroller's opinions or the *Meadows* and *Marchese* opinions. Moreover, the court below's reasoning – that Congress must amend the clear and unambiguous language of a statute to prevent its amendment by inconsistent judicial and administrative interpretations – turns the proper analysis on its head and confuses the functions of the various branches of government.

The language of the statute itself is not ambiguous, as the opinion below concedes. Joint Appendix, p. 14. In such a case, as Judge Ebel noted in dissent, " '[C]ongressional silence, no matter how "clanging," cannot override the words of the statute.' " Joint Appendix, p. 17 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.13 (1985)). *See Leary v. United States*, 395 U.S. 6, 24-25 (1969) (reenactment by Congress of a statute after agency interpretation cannot save a regulation that contradicts the requirements of the statute itself). *See also Biddle v. Commissioner*, 302 U.S. 573, 582 (1938) (where the law is plain

---

[16] *Helvering v. Hallock*, 309 U.S. 106, 120 (1940) (Frankfurter, J.).

the subsequent re-enactment of it does not constitute adoption of its administrative construction).

The majority below indicated in a "cf." citation that it relied on *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986). In that case, however, the Court relied not on congressional inaction in the face of an administrative construction, but rather on Congress' express adoption of the FDIC's regulatory definition of the disputed term when amending the statute. *Id.* Moreover, the case involved the definition of the term of art "deposit" in the complex context of federal banking law by the agency charged with administration of federal deposit insurance programs.

The so-called "re-enactment rule" has been strongly criticized, *e.g.*, J. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture Into Speculative Unrealities*, 64 B.U.L. Rev. 737, 755 (1985), and the Court has properly employed it with increasing caution in recent years. It is typically invoked as a secondary confirmation of an interpretation supported by independent grounds; *e.g., Grove City College v. Bell*, 465 U.S. 555, 568 (1984) (congressional silence "not dispositive"); where there is affirmative evidence that Congress was actually aware of existing interpretations during the amendment process; *e.g., Blanchard v. Bergeron*, 109 S. Ct. 939, 943 (1989); where the interpretation is by an agency specifically charged with the enforcement and administration of the statute and the interpretation appears in formal regulations or adjudication. *E.g., Philadelphia Gear.*

None of these factors exists in the present case. Nothing in the legislative history of section 1821, its predecessors, or related provisions makes any reference to

administrative or judicial interpretations concerning inmate witnesses. This Court has never ruled on the issue, and the two lower court opinions extant in 1978, *Meadows* and *Marchese*, given their brevity and subject matter, can hardly be expected to have achieved notoriety beyond the limited circle of interested parties. The only written administrative interpretations of the statute were based not upon section 1821 but upon different predecessor statutes. These were buried in Comptroller's opinions decades old, and involved, in one case, the disputed sum of $8. 18 Comp. Gen. 609 (1939). Any presumption that Congress was aware of such interpretations in 1978 is a transparent fiction. The Department of Justice is not charged with special responsibilities for the statute, or delegated discretion in making law. *See Adams Fruit*, 110 S. Ct. at 1390-91. In any event, it did not promulgate regulations on the subject until 1986, eight years after the statute's most recent amendment.

An excerpt from the history of the witness fee statute illustrates the dangers inherent in imputing to Congress an intent to endorse obscure administrative constructions based on legislative inaction. There were "administrative interpretations" of the statute in 1939 in the form of two opinions of the Comptroller General. 18 Comp. Gen. 609; 18 Comp. Gen. 765. Both held convicted prisoners ineligible for witness fees, relying in part on language in the contemporaneous version of the witness fee statute which excluded "employees of the Government" and "detained witnesses." Act of April 26, 1926, c. 183, § 1, 44 Stat. 323.[17]

---

[17] "[J]urors and witnesses (other than witnesses who are salaried employees of the Government, and detained

(Continued on following page)

In 1948, Congress amended section 1821. It eliminated the exclusionary language with respect to witness fees, and altered the exclusionary language in the subsistence allowance provision. Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950.[18]

Following the assumptions of the "re-enactment rule," Congress would be presumed to have been aware of these Comptroller General's opinions and the amendment should be regarded as having specifically overruled them. Surely that deliberate and explicit expression of congressional intent overwhelms any presumption that Congress' later silence on the subject impliedly approved those same interpretations. Surely it cannot be presumed that congressional inaction speaks more forcefully than congressional action.

There is no reason to conclude, as did the court below, that Congress ever adopted, or acquiesced in, any administrative interpretation of the statute contrary to its language.

V. THE SPECULATIVE POLICY CONCERNS OF THE COURT BELOW CANNOT JUSTIFY ITS AMENDMENT OF THE STATUTE

"[I]f inmates were to receive a $30 fee for every day they attend court to serve as a witness, which is much

---

(Continued from previous page)

witnesses) in the United States courts . . . shall be entitled to a per diem for each day of actual attendance."

[18] "A witness attending in any court of the United States . . . shall receive $2 for each day's attendance. . . . Witnesses who are not salaried employees of the Government and who are not in custody . . . shall be entitled to an additional allowance of $3 per day for expenses of subsistence."

more than they make working in prison industries, it is not difficult to imagine the potential abuses that might result." Joint Appendix, p. 16. Here, apparently, is the crux of the matter: the majority of the panel below feared that Congress had been unwise in failing to exclude prisoners and felt impelled to remedy the error.

There is, of course, no factual record from the courts below, and therefore no basis to determine whether the "imagined potential abuses" envisioned by the court below are real or phantasmagorical. It would be interesting to know, for example, how many inmate witnesses presently testify in federal courts, how many of those are summoned by the government and how many by indigent or solvent defendants or by civil litigants, and how the payment of witness fees might affect these statistics. It is possible to speculate that, were solvent criminal defendants required to pay witness fees to inmates, the disincentive might have beneficial effects. *See, e.g., United States v. Garmany*, 762 F.2d 929 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986). Presumably, Congress has the resources available to investigate these questions and formulate appropriate policy in response if it chooses to do so. And unless the law is enforced as written, it will never be known whether the problems imagined by the court below are real or fictional.[19] *See Hurtado v. United States*, 410 U.S. 578, 591 (1973).

---

[19] As Judge Ebel pointed out in dissent, the majority's fears about payment to inmate witnesses leave out the role of district court judges in managing cases to prevent abuses. Joint Appendix, pp. 21-22. Experienced trial judges would presumably not permit the courts' power to be abused by issuing writs

(Continued on following page)

At a minimum, such hypothetical problems cannot justify a conclusion that payment of witness fees to prisoners is an "absurd" application of the statute permitting a departure from the statute's plain language. *See Citicorp*, 483 U.S. at 36-38 (applying sanctions to secured creditors while exempting common carriers and bona fide purchasers of "hot goods" is rational distinction which furthers certain purposes of act, even if all three are innocent parties). *Cf. Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981, 1985 (1989) (Congress cannot have meant Fed. R. Ev. 609(a)(1) to provide procedural advantage to civil defendants but not to civil plaintiffs when obvious intent of provision was to safeguard rights of criminal defendants).

(Continued from previous page)

in aid of frivolous or self-serving litigation, or by summoning cumulative witnesses. *See* Fed. R. Crim. P. 17(b) (requiring court to subpoena witnesses on behalf of an indigent criminal defendant "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense"). *See also Marks v. Calendine*, 80 F.R.D. 24 (N.D.W. Va. 1978), *aff'd*, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (taxing witness costs to prisoner, proceeding in forma pauperis, who brought meritless civil rights action against warden and others). In any event, it is for Congress to decide whether potential abuses outweigh the potential benefits of encouraging "free and full" testimony from inmates who possess important testimony.

CONCLUSION

> In conclusion, this is not an instance in which a statute produces an "unfathomable" result and "can't mean what it says." . . . Section 1821 is neither internally inconsistent nor facially ambiguous. Under a plain reading of the statute, prisoners serving as witnesses are entitled to attendance fees but not to subsistence allowances. That result is neither illogical nor irrational. There is no legislative history showing conclusively that the statute does not mean what it says. Consequently, . . . prisoners, like other witnesses, are entitled to witness attendance fees under Section 1821.

Joint Appendix, p. 22 (citations omitted) (Ebel, J., dissenting).

Because the court below denied him the fees to which he is entitled under section 1821, Petitioner respectfully requests that the judgment of that court be reversed, and that the case be remanded to the court of appeals with instructions to remand in turn to the district court for entry of an order requiring the clerk to certify that Mr. Demarest is entitled to payment of $300 from the United States Marshal pursuant to 28 U.S.C. section 1825(a).

Respectfully submitted,

James E. Scarboro
Counsel of Record
(Appointed by this Court)
Alfred T. McDonnell
David C. Warren
Arnold & Porter
1700 Lincoln Street
Suite 4000
Denver, Colorado 80203
(303) 863-1000